71-1431

FILED
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IN THE

Supreme Court of the United States

October Term, 1971.

RESPONSE NOT PRINTED

No. 71- .

TRIANGLE PUBLICATIONS, INC.
and
JAMES GERHART,
Petitioners,

v.

RAYMOND MATUS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Triangle Publications, Inc. and James Gerhart hereby petition that a Writ of Certiorari issue to review the judgment entered by the Supreme Court of Pennsylvania on December 20, 1971, reargument of which was denied on February 4, 1972, which affirmed a judgment of the Court of Common Pleas of Delaware County, Pennsylvania, entered upon a verdict for Raymond Matus in the amount of $13,500.00 for radio defamation.

OPINIONS BELOW.

The plurality and dissenting opinions of the Supreme Court of Pennsylvania are reported at 445 Pa. 384. They are reprinted in Appendix A, pp. A1-A14 and A14-A15 respectively. The order of the Supreme Court of Pennsylvania denying the Petition for Reargument is printed in Appendix A, p. A16. The opinion of the Court of Common Pleas of Delaware County of Pennsylvania is not reported. It is printed in Appendix B, pp. A17-A35.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on December 20, 1971; and a timely petition for reargument was denied on February 4, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

Following an exceptionally heavy snowfall which covered the Philadelphia metropolitan area, Petitioner, Gerhart, an announcer on a "talk show" on Petitioner Triangle's radio station discussed a "high" price charged by Respondent Matus, an off-duty policeman, for snow plowing the announcer's home driveway. Respondent had not personally done the plowing and subsequently recovered substantial damages for libel *per se*, despite the fact that he did not introduce the actual alleged defamation into the record. On appeal the Supreme Court of Pennsylvania stated that this case, at best, "presented a marginal case of libel *per se*," but nonetheless affirmed, holding that (1) it would not review the record *de novo* to test the sufficiency of the evidence of defamation even though a motion for a non-suit had been made and even though the effect of the judgment was to award damages for non-libelous speech, and (2) statements involving "personal pique" constitute a special exception not entitled to protection under the rule of *New York Times v. Sullivan*. Therefore the questions presented are:

1. Did the Supreme Court of Pennsylvania err in failing to make the independent, *de novo*, evaluation of the constitutionally significant facts of record required by this Court's decisions, an evaluation which would have shown that no libel was, in fact, proved?

2. Did the Supreme Court of Pennsylvania err in creating a special *per se* category of malice under the *New York Times v. Sullivan* and *Rosenbloom v. Metromedia, Inc.* rule based on the "personal" nature of a statement made over the radio?

3. Did the Supreme Court of Pennsylvania err in permitting a penalty to be imposed for speech, where the exact words of the speech were not of record to permit an independent constitutional evaluation of their alleged libelous nature?

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

James Gerhart, one of the Petitioners, was, in 1966, employed as the host of a daily radio broadcast on radio station WFIL in Philadelphia, Pennsylvania, a station owned by Triangle Publications, Inc., the other Petitioner. The program was a "talk show," involving conversations, news and announcements, music and telephone conversations with listeners, which included "discussion of local matters, issues, things of interest locally" App. A2; A18. On the evening before the broadcast in question, a very heavy snow had covered the Philadelphia metropolitan area. So that Gerhart could be at the station to start his 6:00 A. M. show, he stayed at a hotel that night near WFIL's offices to avoid travel problems. The following morning, during a news break in Gerhart's show, his wife telephoned him and, among other things, reported that the preceding evening one Raymond Matus, an off-duty policeman, had pursuant to a telephone request, plowed their driveway at home and charged $35.00 for the job.

Returning to the air after the phone call, Gerhart engaged another announcer in conversation on the subject of snow plowing. During the course of this conversation, Gerhart mentioned the charge of $35.00, the name of Matus and the fact that the charge was in his opinion very high. He warned listeners generally to beware of high charges for plowing. In response, radio listeners phoned in and related their own experiences.

While the evidence was clear that Matus did not personally conduct the plowing, there was conflicting testimony as to whether or not he had sent the people who did the plowing and had received part of the proceeds for it.

Matus brought a common law action for libel *per se*, or radio defamation as it is sometimes called in Pennsylvania.

He did not introduce a transcript or record of the broadcast at trial, although through discovery one had previously been made available to him and he and his counsel had listened to it. Matus himself had not heard the original broadcast. Two witnesses whom he presented had heard the broadcast, but did not remember the exact words of the alleged defamation.

At the close of Matus' case, Triangle and Gerhart moved for a non-suit. The trial Judge said:

> "You [Matus' attorney] said in your Complaint grossly overcharged and your proof is just overcharge. I am going to let it go, but I think its close. I will refuse your [Petitioners' attorney] motion and grant you an exception." (R. 113a)

The jury, after deliberation for four hours,[1] returned a verdict for Matus in the amount of $13,500.00. Counsel for Triangle and Gerhart then moved the Court for a new trial, citing as error, *inter alia*, the failure of the trial court to grant its non-suit. This motion was denied.

The case was appealed to the Supreme Court of Pennsylvania and oral argument was held on May 6, 1970, a year prior to this Court's decision in *Rosenbloom v. Metromedia*, 403 U. S. 29 (1971). The Supreme Court of Pennsylvania affirmed the judgment of the trial court in an opinion which only two other Justices joined. Two Justices concurred in the result without opinion. One Justice dissented, and one did not participate.

Justice Roberts, dissenting, would not have reached the issue of the scope of *New York Times* and *Rosenbloom* at all. He found, more basically, that under the precedents,

1. The jury deliberated three hours and then asked for special instruction on "privilege." On the theory that Matus was not a public man, the trial Judge refused a request for a *New York Times* charge, but gave a common law charge. This was error since Matus was a policeman and was involved in an event of public importance.

the evidence of record did not show a defamatory statement as a matter of state law, App. A15. The plurality opinion of the Court refused to reach this issue on the ground that trial counsel for Petitioners had not moved for a judgment notwithstanding the verdict.[2] Significantly, the Court said:

> "While we might be inclined to agree that [*Matus*] *presented a marginal case* of libel *per se*, particularly since the exact words employed were never introduced in evidence, *we decline to consider* this assignment of error. As noted above, [Gerhart and Triangle] did not move for judgment notwithstanding the verdict. . . ." [Emphasis added]. App. A5.

This erroneous threshold holding led the Court into a lengthy consideration of this Court's rulings establishing the First-Fourteenth Amendment privileges in State defamation cases. Considering in particular this Court's recent ruling in *Rosenbloom v. Metromedia*, 403 U. S. 29, 1971, the Pennsylvania Supreme Court stated:

> "We have no doubt that Gerhart could with impunity talk all he wished about the weather (it is sometimes difficult to say enough bad things about the weather), and to discuss the problems of snow removal." App. A13.

However, it went on to hold of the discussion by Gerhart as testified to at trial:

> [I]t was by no stretch of imagination a matter of public concern that Gerhart thought he or his wife had been bilked by Matus the evening before; it was but a matter of private pique. App A13-14.

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2. Actually, the motion for a new trial by Triangle and Gerhart raised the issue of the sufficiency of the evidence.

In so ruling, the plurality opinion entirely misconstrued the issues at stake and created an area of *per se* malice under the *New York Times v. Sullivan* rule for matters involving "private pique"—for "private pique" goes to the motivation behind the speech; and not to the content itself, its significance, or its value to the listening public.

Gerhart and Triangle petitioned the Supreme Court of Pennsylvania for reargument, pointing out that it had failed to follow its duty under decisions of this Court to make a *de novo* review of constitutional fact under the First and Fourteenth Amendments. The petition was denied on February 4, 1972, App. A16.

REASONS FOR GRANTING THE WRIT.

I. The Pennsylvania Supreme Court, in Violation of This Court's Decisions, Erected a Technical Screen Against Review of First Amendment Issues Which Seriously Infringes the "Breathing Space" Which That Amendment Requires.

The Supreme Court of Pennsylvania clearly recognized the existence in this case of a serious First and Fourteenth Amendment issue of free speech: that the record evidence did not demonstrate the existence of any defamatory speech. Justice Roberts, dissenting, was the only Judge below to declare the Pennsylvania law on the matter, and he held "that a dissatisfied customer's mere statement that he was forced to pay too high a price for a particular service is [not] actionable." App. A15. The plurality opinion of the Supreme Court "declined to consider", App. A5, this substantive issue, holding that it was barred from doing so by the alleged failure of trial counsel to move for a judgment notwithstanding the verdict—a procedural request which in Pennsylvania raises the issue of the sufficiency of the evidence to show any defamation at all.[3]

This holding by the Supreme Court of Pennsylvania flies directly in the face of a long and important line of holdings by this Court that courts, including the Pennsylvania Supreme Court, have a duty, *sua sponte*, to make an independent evaluation of the record evidence to determine if First Amendment rights have been infringed, regardless of the procedural situation in the trial court. Specifically, in the area of free speech, this Court held just last Term in *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 24 (1971):

3. In fact, the Supreme Court was in error on this point, since trial counsel raised the issue of the sufficiency of the evidence both by a motion for non-suit, which was denied by the trial court, and in a motion for a new trial.

"[W]e have repeatedly recognized that courts may not avoid an excursion into fact finding in this area simply because it is time consuming or difficult. . . . *Pennekamp v. Florida*, 328 U. S. 331, 335 (1946). . . . [T]his Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments', and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case'. *Jacobellis v. Ohio* 378 U. S. 184, 190 (1964). The simple fact is that First Amendment questions of 'constitutional fact' *compel this Court's de novo review.*" See *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn v. Alabama*, 361 U. S. 199, 205 n. 5 (1960).

Also just last Term, this Court held in *Time, Inc. v. Pape*, 401 U. S. 279, 284 (1971):

"[I]n cases involving the area of tension between the First and Fourteenth Amendments on one hand and state defamation cases on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff. *New York Times* . . . . [*v. Sullivan*, 376 U. S. 254], 284-285; *Beckley Newspapers v. Hanks*, 389 U. S. 81, 83; *St. Amant v. Thompson*, 390 U. S. 727; *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U. S. 6, 11,"

and

"Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusion of lower courts, but will reexamine the evidentiary basis upon which those conclusions are founded'. *Niemotko v.*

Maryland, 340 U. S. 268, 271; *cf. Napue v. Illinois*, 360 U. S. 264, 271-272."

The plurality opinion in the Supreme Court of Pennsylvania, of course, purported to couch its decision solely in terms of the defamation law of Pennsylvania—that is, sufficiency of the record to make out a case of libel *per se* and failure to move for judgment notwithstanding the verdict. This characterization, however, was incorrect and is irrelevant for present purposes. The cases from this Court cited above show that First Amendment questions of constitutional fact "compel . . . *de novo* review." *Rosenbloom v. Metromedia, Inc., supra.*

The reason for this reexamination is clear. This Court has long since held that the First Amendment forbids the states—including the state courts—from in any way restricting speech unless it falls into four strictly limited categories: "lewd and obscene," "profane," "fighting words" and "libel." *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942). Thus, it is forbidden for any state court, including the state supreme court, to limit freedom of speech by imposing or upholding a judgment against it, unless that speech falls within one of the four categories. *Grove Press, Inc. v. Philadelphia*, 418 F. 2d 488 (3d Cir. 1969). This creates a sea of free speech with four limited islands of exception. Therefore, any technically "state law" decision that a given speech falls within one of these exceptions—in this case "libel,"—inevitably raises a Federal constitutional issue. For if a given speech is not libelous (that is, would not survive a motion for compulsory nonsuit or judgment notwithstanding the verdict on a given record), it is by definition constitutionally protected speech.

For this reason, the attempt of the plurality opinion of the Supreme Court below to avoid the threshold question of the existence of a libel *vel non*, by treating it as a matter

of state substantive law and procedure was in direct conflict with numerous holdings of this Court. Thus, regardless of the conclusion which the Supreme Court of Pennsylvania might have reached on the merits,[4] its refusal to undertake its constitutional duty constitutes a serious error which, if permitted to stand, could have far-reaching impact on the disposition of Federal constitutional issues by State Courts everywhere. In fact, this error is directly in conflict with older and more recent decisions of this Court and so serious that it would warrant a reversal on these papers.

II. The Court Below Created an Erroneous and Far-Reaching *per se* Exception to This Court's Requirement of a Showing of Actual Malice in *New York Times* and *Rosenbloom* Threatening Serious Impingement on an Important Media Forum.

Having erroneously refused to decide the threshold constitutional issue of whether the record showed an unprotected libel or not, the Court went on to presume that the record did, *in fact,* show such a libel. It, therefore, felt compelled to undertake elaborate analysis of the rulings of this Court on the applicability of the First and Fourteenth Amendments to state libel cases and the privileges created by those holdings. Its approach to this analysis was in serious error and led to a direct conflict with holdings of this Court.

It first recognized correctly that when the *object* of untrue speech is a public official or public figure, a state libel judgment may not be imposed unless the speech is made with actual malice. *New York Times Co. v. Sullivan,* 376, 254 (1964). It also noted that this rule, and the privilege

4. The dissenting opinion indicates that had the plurality opinion reached the issue, as it was in fact bound to do, it would have found no libel to exist, and therefore the speech at issue would have been fully protected and immune from civil judgment.

it creates, has been extended to defamatory falsehood "uttered in a news broadcast by a radio station about the [anonymous] individual's involvement in the event of public or general interest." *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 31 (1971).

Moreover, the plurality opinion of the Pennsylvania Supreme Court *did not* purport to hold that the *Rosenbloom* criterion of an "event of public or general interest" was insufficiently broad to cover the situation of a blizzard-like snow storm which crippled the Philadelphia metropolitan area. Indeed, the Court expressly held:

> "We have no doubt that Gerhart could with impunity talk all he wished about the weather . . . and to discuss the problems of snow removal." App. A13.

Thus, the plurality opinion recognized, as it had to, that a fair reading of the various opinions in *Rosenbloom* shows that the privileges recognized in that case encompass discussion in a radio talk show of blizzard-type conditions and the problems arising from them. No indication of actual malice on the part of Gerhart appears in the record, and the jury was not charged on the issue of actual malice.[5]

Despite this crucial fact, the plurality opinion of the Supreme Court of Pennsylvania went on to hold that the statements made by Gerhart *were not* protected by a *Rosenbloom* privilege. The basis of its holding was a novel one:

> "[I]t was by no stretch of imagination a matter of public concern that Gerhart thought he or his wife had been bilked by Matus the evening before; it was but a matter of private pique." App. A13-A14.

The impact of this holding in context is clear: the subject matter of a discussion which would otherwise be protected

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5. Petitioners' request for an "actual malice" charge *and a New York Times charge was denied* (App. A217).

under *Rosenbloom*—severe snow storm and snow removal—is not protected where the record shows that the source or motivation for the speech in question was personal in nature—derived from the personal or family experience of the speaker—rather than in some other presumably more general manner. In such a situation, the Supreme Court of Pennsylvania in effect holds, a libel plaintiff need not prove actual malice,[6] but can go before the jury under a "reasonable care standard." Thus, properly viewed, its holding carves out an area—discussion based on personal or family knowledge—in which the malice required by *New York Times v. Sullivan* and *Rosenbloom* may be presumed to to exist *per se*.

Permitted to stand, such a holding could signal a significant exception to the *New York Times v. Sullivan* doctrine, an exception this Court has never recognized. Such a ruling is particularly confining in the very factual situation in which this case arose—the informal radio discussion program, with telephoned audience participation, which has become such a popular forum for public discussion in all parts of the country. The subject matters of such programs are, by their nature, local in interest and related to matters of personal listener concern. This fact only increases their significance for the local community. By this very nature, in contrast to matters of State or national news, the personal knowledge of the radio host and the members of the public with whom he talks plays a major role. The ruling below would make any personal discussion on such programs malicious *per se*, if they happened to

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6. The evidence of record clearly reveals that Gerhart harbored no actual malice against Matus. He knew his wife had requested Matus to do the plowing, that persons saying they were sent by Matus did the plowing and charged a high price. Gerhart had every reason to believe the facts he was stating were true, and much record evidence indicates that they were, in fact, true.

be untrue, and would have a very distinct chilling effect upon such discussion forums.

Federal lower court cases decided since *Rosenbloom* have given that decision an increasingly broadened effect, *e.g., Time, Inc. v. Johnston,* 448 F. 2d 378 (4th Cir. 1971); *Credit Bureau of Dallas, Inc. v. CBS News,* 40 U. S. L. W. 2189 (D. Ga. 1971). The significant decision of the Pennsylvania Court here constitutes a major state inroad into *Rosenbloom* which should be corrected by this Court.

III. The Court Below Committed Serious Procedural Error in Penalizing Speech Without a Transcript of the Speech Before It in the Record.

The present case presents a novel issue in the area of First Amendment free speech adjudication. The Pennsylvania Courts have imposed a penalty upon the exercise of speech without having in the record before them the actual wording of the speech in question so that they could determine whether or not it fell within the area of Constitutional protection.

The discussion for which Respondent Matus obtained damages in the Pennsylvania courts took place on a public radio broadcast. An electronic transcript was made by the station and Matus obtained this through discovery procedure. He did not, however, present the transcript at trial.

As noted in the first reason for granting the writ, each State Court (as well as this Court) which would impose a penalty on the exercise of speech must make an independent determination of whether that speech falls within or without the area of constitutional protection. When the actual speech is not made part of the record by the Plaintiff—the party who asked the State Courts to penalize speech—that constitutionally compelled task of the Courts becomes impossible. Since the respondent had the burden of proving

the libelous statement, his failure to provide the statement to the courts for review requires a reversal. Every decision of this Court involving the present action of the First Amendment to State libel actions begins with and is grounded upon the presentation of the allegedly libelous language involved. See, *e.g.*, *New York Times v. Sullivan*, *supra*; *Rosenbloom v. Metromedia, Inc.*, *supra*. This is necessary because such constitutional issues require the subtlest and most careful analysis by the Courts. If permitted to stand, this action by the Court below could create a far-reaching precedent for State Court action which could infringe upon speech actually protected by the First and Fourteenth Amendments.

CONCLUSION.

For the foregoing reasons it is respectively submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Dated: May 3, 1972

CERTIFICATE OF SERVICE.

I hereby certify that on the 3rd day of May, 1972 three copies of this Petition for a Writ of Certiorari were served by first class mail, postage prepaid, on Frank J. Marcone, Esquire, 208 West Front Street, Media, Pennsylvania 19063.

I further certify that all parties required to be served have been served.

ROBERT W. MARIS,
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APPENDIX A

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

Matus *v.* Triangle Publications, Inc. and James Gerhart, Appellants.

OPINION BY MR. JUSTICE POMEROY, December 20, 1971:

This appeal involves defamation by radio, and presents two questions: (1) whether the statement made relative to plaintiff-appellee was actionable, and (2) whether defendants' admitted conditional privilege was exceeded and so lost.

Appellee brought this action in trespass against Triangle Publications, Inc., owner of WFIL radio station, and James Gerhart, its employee, appellants, charging that Gerhart had "falsely and maliciously uttered words over the air waves, stating that plaintiff, by his agents, had grossly overcharged the wife of James Gerhart to plow her driveway"; that the words uttered were false and that Gerhart knew or should have known them to be so; and that in consequence appellee had been injured in his good name, credit and reputation, to his damage. The answer pleaded, under "New Matter", that the statements were privileged, having been made in good faith, with sufficient cause for believing them to be true, on a proper occasion, from a proper motive and as a matter of public interest, information and comment. After trial before a jury a verdict was returned in favor of appellee and against appellants in the amount of $13,500.[1] A motion for new trial was overruled, and this

1. The verdict was solely for compensatory damages; punitive damages were not sought and the court charged that the jury was "not to consider punishing the defendants for their actions."

appeal followed.[2]

The salient facts are as follows: Appellee owned and operated a garage from which he conducted, as the weather warranted, snowplow operations in winter.[3] Appellant Gerhart was the host of a "talk show" broadcast daily from 6:00 a.m. to 10:00 a.m. over radio station WFIL in Philadelphia, which station was owned and operated by appellant Triangle Publications, Inc. The "show", according to Gerhart, was "a conversation program, using the telephone", in which a little music was played but, "by and large it is a conversation with people on the telephone, discussion of local matters, issues, things of interest locally."[4]

On the evening before the broadcast in question a heavy snowstorm, 12 to 18 inches in depth, had struck the Philadelphia area. Gerhart spent the night at a motel near the radio studio to facilitate his getting to work the next day. During a newscast intermission in the talk show the following morning, Mrs. Gerhart telephoned her husband. She related, among other things, that on the preceding evening

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2. Appellants filed no motion for judgment n.o.v., but asserted as one ground for new trial that the trial court erred in refusing appellants' motion for nonsuit at the close of plaintiff's case. The court correctly held that the refusal of a nonsuit is not ground for a new trial, and was not properly before the court on the new trial motion. See *F. W. Wise Co., Inc., v. Beech Creek R.R. Co.*, 437 Pa. 389, 263 A. 2d 313 (1970), footnote 2 at p. 392.

3. Appellee was also a full time police officer of Radnor Township, Delaware County. The alleged defamatory utterance, however, had to do only with his activity as a snow-plow operator, and appellee's vocation as a policeman was not a factor in the case. Appellants do not base their claim of privilege on the ground that appellee was a "public figure" within the meaning of *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964).

4. The opinion of the lower court, in denying the defendants' new trial motion, stated that defendants' program was not one of criticism and comment. According to defendants' own evidence, said the court, "[i]t was a 'talk' show, with audience participation. There was no expertise or critical evaluation of literature, art, public figures, events or the like. Its purpose and format were for entertainment, general information and non-critical comment."

she had had their driveway at home plowed by Mr. Matus, and that the charge for this work had been $35. Mrs. Gerhart testified that her husband "got a little mad" on hearing the cost. Gerhart himself testified that he "was rather staggered" and "thought it was an exorbitant price. . . ." Returning to the air following the newscast, Gerhart engaged the newscaster in conversation on the subject of snowplowing, and said he had been charged $35 for having his own driveway plowed. The newsman asked who had done the job, and Gerhart replied, as he testified, "I don't know . . . I got the name from Sue [Mrs. Gerhart] during the news. I think it was a company called Matus or something like that." There followed a discussion in which, as he said, Gerhart issued a "moral warning", that "goodness sake, watch out for this kind of thing going on". Gerhart testified that "people called in, and they would relate similar incidents . . . nobody seemed able to top that one, however, on that particular day."

Three others in addition to Gerhart testified concerning the broadcast: Matus himself and two acquaintances, one a customer and one a fellow police officer. The customer, one Schultz, could not recall what was said, but did remember hearing Matus' name mentioned in "a short conversation about the snowplow business and didn't think that was too right." He was then asked:

> "Q. What was your reaction to hearing that?
>
> "A. Well, I shook my head. I said maybe instead of [that] guy giving me a break all the time, he is putting it to me."

The police officer, Burgess, while not recalling the words used, remembered the broadcaster "saying something about the fee that was charged was out of line. It was much too high and people like this shouldn't be in busi-

ness, and he mentioned the name Matus". Matus himself heard only a tape replay of the program at the WFIL studio after suit was brought. He testified: "He [Gerhart] said that this Matus garage had plowed his driveway and charged him $35 and his wife was home alone, and people like this, taking advantage of a woman at home alone, and he said they shouldn't be in business." Asked how long the "announcement" took, Matus replied: "He talked about it for a couple of minutes and then later on in the show he got a call, I believe, from a lady in New Jersey, and she said that was outrageous, and she was talking to him about it and didn't mention my name again. And later on in the show he made a remark about it again but didn't mention my name."[5]

Appellant Gerhart's wife testified that the driveway had been plowed in response to two telephone calls she had made to Matus' garage. She said that after the plowing she had paid a Mrs. D'Angeli, who came to the door from the snowplow vehicle and announced "I am here to collect for Matus", explaining that "he" was in the truck. Mrs. Gerhart said, "I guess I did get a little upset, but I paid her the cash and she left."

Matus in rebuttal denied having received any telephone call from Mrs. Gerhart to plow her driveway, denied that he had plowed it, and denied that he had authorized or contracted with anyone else to plow it. In refutation of these denials, appellants produced Mr. D'Angeli, who testified that he had been asked by Matus to plow a couple of driveways on the night in question, including Gerhart's, that he had done so, and that Mrs. D'Angeli, who was with him on the plow vehicle, had indeed collected $35. The witness stated that he considered this charge reasonable for a circu-

5. The tape or a written transcription of the broadcast would obviously have been the best evidence of what was said but neither one was offered by either Matus or appellants.

lar 75′ driveway under the drift conditions he encountered. He testified that his arrangement with Matus was that Matus was to receive $20 for the job, and that the witness paid him this sum a day or two later.

In his program on the morning following the broadcast involved, Gerhart made a retraction based on Matus' statement to him in the interval that Matus had not plowed the driveway.[6]

Appellants' first argument on this appeal is that the words used by Gerhart were not actionable because they did not touch appellee in his business or profession; that they did not "impeach" Matus' skill, knowledge or professional conduct. The basis of this contention appears to be that the broadcast statement referred to but one incident of overcharge and not to a course of conduct; there was no suggestion in the broadcast that his services were unsatisfactory or unworkmanlike. While we might be inclined to agree that the appellee presented a marginal case of libel *per se*, particularly since the exact words employed were never introduced in evidence, we decline to consider this assignment of error. As noted above (footnote 2), appellants did not move for judgment notwithstanding the verdict, nor do they now press insufficiency of the evidence as ground for a new trial.[7] Moreover, the brief of appellants seems to concede that the trial court was not in error in its preliminary finding that the words allegedly used were capable of a defamatory meaning. Appellants' assertion that the court's charge in effect told the jury that they should find that the words used were understood by the re-

6. Matus testified on cross-examination that in his retracting statement Gerhart said: "I have to eat crow today. It is just one of those unfortunate things that reputable businessmen in town have to suffer by a few people who use their names and do bad things."

7. The contention made below that the verdict was grossly excessive has likewise been abandoned on appeal.

cipients to be defamatory is without merit; viewed as a whole, the portion of the charge dealing with this aspect was not erroneous.[8]

Appellants next urge that the court erred in its charge as to loss of privilege. The court charged that the appellants, as a radio broadcasting station and an employee of the station, respectively, in conducting a program of discussion and comment about local matters, had a conditional privilege. This was not disputed by appellee. The court went on to charge that because of this privilege appellee could not recover unless he proved that the statements in question were false, and were made either with knowledge of the falsity or "without reasonable care to ascertain their truth or falsity before making them." The words "without reasonable care" were equated with negligence, which was properly defined in terms of lack of that due care which a reasonable man would have used under the circumstances to ascertain whether the statements were true before giving them currency. The court declined appellants' points for charge which would have required appellee, in order to destroy the conditional privilege, to prove by clear and convincing evidence either (1) knowledge of falsity or (2) actual malice in making the statements, defined as reckless disregard of whether the statements were true or false. The court thus employed the traditional Pennsylvania law on the subject of conditional privilege, without reference to the federal constitutional dimension of the privilege as it has recently evolved.

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8. The court charged as follows: "The Court in this case has determined that the language used was capable of a defamatory meaning, because overcharge means overreaching or unfair or unethical business conduct, and we, you and I, are to interpret words as they would naturally be understood by a person hearing them.

"Now, it is for you to determine whether the statements, which were capable of a defamatory meaning, did in fact have such a meaning, and were so understood by the persons hearing the broadcast."

In *Summit Hotel Co. v. National Broadcasting Company*, 336 Pa. 182, 8 A. 2d 302 (1939), this Court was presented with its first case of defamation through a radio broadcast. Speaking through Mr. Chief Justice KEPHART, the Court said: "In considering the basis of liability for defamation by radio and in balancing the conflicting interests, due regard must be had to the rights of all parties, and to the ultimate and collateral effects any pronouncement might have on public interests. A rule unalterably imposing liability without fault on the broadcasting company under any circumstances is manifestly unjust, unfair and contrary to every principle of morals. A fair aspect of the harm to the persons injured must be considered as well as the circumstances under which the incident occurred." The Court there held that the broadcasting company was not liable for a nonemployee's false defamatory statement ("that's a rotten hotel") interjected into a prepared script which the company had inspected and edited and where it had no reason to believe that an extemporaneous defamatory remark would be made. But the opinion added that "[w]here the broadcasting station's employee or agent makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice."[9] No claim of

9. The Court took note of the debate going on at the time of the decision as to whether publication of defamatory matter by radio was to be considered as slander or as libel. It did not fully resolve the issue for Pennsylvania, stating, "[T]he danger of attempting to apply the fixed principles of law governing either libel or slander to this new medium of communication is obvious"; it refused, however, to impose a rule of liability without fault on a radio broadcaster, as some states had done by analogy to their rules relating to newspaper publishers. In *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A. 2d 662 (1963), the opinion of the Court observed, in passing, that "the common law distinctions between these two terms [libel and slander] [are] not applicable to the law of radio." See also *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737 (D.C. E.D. Pa. 1968), rev. 415 F. 2d 892 (C.A. 3d Cir. 1969), affirmed 403 U.S. 29, 29 L. Ed. 2d 296 (1971); *Restatement of Torts*, §568, comments *b* and

privilege was there asserted. We have had occasion recently to make an exhaustive analysis of the Pennsylvania law of defamation: *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A. 2d 899 (1971). We there reviewed the basis of the defense of privilege under Pennsylvania law and the modifications thereof necessitated in situations where a public official or public figure is the object of the libel by the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964). We there stated: "The privilege spawned in New York Times Co. v. Sullivan, supra, and elaborated upon in subsequent cases is a qualified privilege, albeit one of constitutional stature. It is of the same genre as that discussed above, although because of its constitutional stature, not encumbered by all the intricacies related thereto established by prior Pennsylvania case law. And, most importantly, what may constitute an abuse thereof has been declared by the United States Supreme Court. That is, *to overcome the constitutional privilege, the plaintiff must prove that the defendant was actuated by 'actual malice', i.e., published the communication 'with knowledge that it was false or with reckless disregard of whether it was false or not.'*" 441 Pa. at 453. (Emphasis supplied.)

The *New York Times* rule has been expanded considerably in the seven years since it was first enunciated. The most recent extension by the United States Supreme Court was in its decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 39 L.W. 4694 (1971). That case, originating in the District Court of the United States for

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9. (Cont'd.)

d, pp. 159 et seq. Note *Developments in the Law—Defamation*, 69 Harv. L. Rev. 875, 887 (1956). In the case at bar the plaintiff characterized the tort for which he sought recovery as "slander". We prefer to use here the broader term "defamation", which is the term used in the Act of August 21, 1953, P.L. 1291, §1, 12 P.S. 1584a, and the Restatement of Torts section (Section 613) on which the Pennsylvania statute is based.

the Eastern District of Pennsylvania and involving the Pennsylvania law of defamation by radio,[10] presented the question "whether the New York Times knowing or reckless falsity standard applies in a state civil libel action brought not by a 'public official' or a 'public figure' but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest." 403 U.S. 31-32. The Court, affirming the Court of Appeals for the Third Circuit, held that the *New York Times* standard did apply. The "event of public or general interest" involved in *Metromedia* was the prosecution of the plaintiff for a violation of the obscenity laws of Philadelphia resulting from his distribution of nudist magazines. A plurality of the court[11] held that this event was one of public concern because "[t]he community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression." 403 U.S. 43. Said the plurality opinion:

"We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern,

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10. Pennsylvania libel law is succinctly summarized in the opinion of the Court by Mr. Justice BRENNAN. 403 U.S. 37-38.

11. The plurality opinion was by Mr. Justice BRENNAN, joined by Chief Justice BURGER and Mr. Justice BLACKMUN. Mr. Justice BLACK and Mr. Justice WHITE filed separate opinions concurring in the judgment. Mr. Justice HARLAN and Mr. Justice MARSHALL filed separate dissenting opinions, the latter being joined by Mr. Justice STEWART. Mr. Justice DOUGLAS did not participate.

without regard to whether the persons involved are famous or anonymous.

"... It is clear that there has emerged from our cases decided since New York Times the concept that the First Amendment's impact upon the state libel laws derives not so much from whether the plaintiff is a 'public official', 'public figure', or 'private individual', as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, 'The System of Freedom of Expression', 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." 403 U.S. 44-45.

On the preliminary question of extending the reach of *New York Times* to matters of public or general concern, there was no disagreement among the five members of the Supreme Court who wrote or joined in opinions in support of the judgment affirming the Court of Appeals.[12] We therefore accept this modification of the law of defamation in Pennsylvania, and with it the corollary that in such cases the reasonable care standard must give way to the more stringent standard of knowing or reckless disregard of falsity. Specifically we adopt as binding on us the holding of the plurality opinion in *Rosenbloom*, viz.: "We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a news-

12. Mr. Justice BLACK would not, however have rested at that point, but favored a rule "to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." 403 U.S. 57. Mr. Justice WHITE, for his part, would have confined the holding to the facts of the case before it, that is, limit it to issues involving "official actions of public servants." 403 U.S. 61.

cast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." 29 L. Ed. 2d 316.

The question remains whether the defamatory utterance in the case now before us was related to Matus' "involvement in an event of public or general concern." We conclude that it was not.

Determination of this question involves the process of "delineation of the reach" of those terms, which the United States Supreme Court said must be left to future cases. The plurality opinion in *Rosenbloom*, construing the Court's decision in *New York Times*, indicated that the constitutional protection was not to be limited to "matters bearing broadly on issues of responsible government". It cites several examples of the public or general concern concept: federal efforts to enforce a court decree ordering enrollment of a Negro student in a southern university, *Associated Press v. Walker*, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967); an alleged "fix" of a college football game, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967); "opening of a new play linked to an actual incident", *Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456 (1967). Mr. Justice HARLAN, dissenting, terms the language of the plurality opinion on this point a "somewhat extravagant delineation of the public interest involved in the dissemination of information about non-public persons". 403 U.S. 71. Mr. Justice MARSHALL's dissent interprets the plurality opinion as placing a duty on courts to determine "what information is relevant to self-government". 403 U.S. 79.

The Court of Appeals for the Fourth Circuit has applied the protection of *New York Times* and *Rosenbloom* to publications charging that a former professional basketball

player, now a college basketball coach, had played ludicrously, was "psychologically destroyed", and practically run out of organized basketball. *Time, Inc. v. Johnston*, 448 F. 2d 378, 40 LW. 2145 (1971). The Federal District Court for the Northern District of Georgia has applied *Rosenbloom* to bar recovery for a television newscast that poor practices exist in the credit industry, holding that such practices are a matter of national concern. *Credit Bureau of Dalton, Inc. v. C.B.S. News*, 332 F. Supp. 1291 (1971), 40 LW. 2189.

In *Grove v. Dun & Bradstreet, Inc.*, 438 F. 2d 433 (C.A. 3d Cir. 1971), a Pennsylvania corporation engaged in the business of a brick and tile broker, alleged that it had been libeled by a false credit report which indicated an unsatisfied judgment against plaintiff. The jury found for the plaintiff and the district court denied post trial motions. The issue for decision in the Court of Appeals was whether that Court's decision in *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (3d Cir. 1969), as to what is required under the First Amendment to overcome the conditional privilege applied to the Dun & Bradstreet publication. Defendant asserted that plaintiff's credit was "a matter of interest to a segment of the public, viz., its suppliers, creditors, architects and public contractors". The Court of Appeals, however, held that plaintiff's corporate activities were not "of real public interest". "We are not here dealing", said Judge ALDISERT for the Court, "with a publication or broadcast alleging, for example, that plaintiff caused substandard building material to be used in these projects. Such operative facts might constitute a matter of grave public interest. Our research discloses no case, however, which would support the application of the more rigorous standard to the covert reportage of the credit standing of a small brick and

tile brokerage firm, and we decline to do so now.'"[13] 438 F. 2d at 436, 437. We recognize, of course, that the Court of Appeals decision in *Grove*, filed as amended on March 15, 1971, was prior to the Supreme Court's affirmance of the circuit court's decision in *Rosenbloom*. We see nothing in the Supreme Court's opinions in the latter case, however, which would have dictated a contrary result by the Court of Appeals in *Grove*.[14]

Returning to the facts in the case at bar, we have a patently anonymous plaintiff engaged in a one-man snow-plowing business as to whom a defamatory statement, established by the jury's verdict to have been false, is uttered in a radio "talk show" out of "a clear sky", but on a morning following a snow storm. The "announcer" states that his wife has been overcharged by plaintiff, calling him by name, for clearing their driveway of snow, and that "people like that shouldn't be in business". We have no doubt that Gerhart could with impunity talk all he wished about the weather (it is sometimes difficult to say enough bad things about the weather), and to discuss the problems of snow removal. We see no justification, however, for the interjection of Matus' name into the discussion or for the expression of opinion as to his business ethics or fitness to be in business. This was no contribution "to robust debate on public issues"; it was by no stretch of imagination a matter of public concern that Gerhart thought he or his wife had been bilked by Matus the evening before; it was but a matter

13. The Court also held, as an alternative ground of decision, that the *New York Times* standard was not applicable to a publication such as a credit report providing "specialized information to a selective, finite audience." Both grounds of decision in *Grove* were followed by the Court of Appeals for the Tenth Circuit in *Kansas Electric Supply Co., Inc. v. Dun & Bradstreet, Inc.*, decided September 20, 1971. 40 L.W. 2174. This Court has also followed *Grove* in *Baird v. Dun & Bradstreet*, Pa. , A. 2d (1971).

14. Certiorari was denied in *Grove* on October 19, 1971. 40 L.W. 3179.

of private pique. The great values of the First Amendment are not served by making it a haven for unprovoked and defamatory gossip-mongering of interest only to the speaker merely because he happens to be on the radio at the time of speaking. The "breathing space" which the Amendment requires in terms of modification of traditional libel laws will not be restricted by the normal application of the law of Pennsylvania in this case. We hold, therefore, that the decision of the United States Supreme Court in *Rosenbloom v. Metromedia, Inc., supra*, does not require in this case the application of the rule that the appellants' conditional privilege could be defeated "only by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." On the facts before us, it was enough to defeat the privilege that the statement be shown by a preponderance of the evidence to have been uttered "without reasonable care and diligence to ascertain the truth." *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 179, 191 A. 2d 662 (1963). That standard was properly given to the jury in the charge of the trial court.

The judgment is affirmed.

Mr. Chief Justice BELL and Mr. Justice EAGEN concur in the result.

Mr. Justice COHEN took no part in the decision of this case.

DISSENTING OPINION BY MR. JUSTICE ROBERTS:

Without regard to the momentous issues of constitutional law discussed at length in the majority opinion, I dissent and would reverse the judgment below and grant a new trial for the simple reason that the challenged publication is not defamatory.

Although a transcript or tape recording of the radio broadcast was not put in evidence and there is some uncer-

tainty concerning exactly what was said on the air, the essence of the allegedly offensive statement was that Matus had overcharged the radio announcer's wife for clearing snow from the driveway of the announcer's home. The broadcast did not suggest that Matus was dishonest or unqualified or that the snow had been removed in an unsatisfactory or unworkmanlike manner. I do not believe that a dissatisfied customer's mere statement that he was forced to pay too high a price for a particular service is actionable. See *Fowler v. Stradley*, 238 Or. 606, 395 P. 2d 867 (1964); *Lynch v. Lyons*, 303 Mass. 116, 20 N.E. 2d 953 (1939); cf. *DePasquale v. Westchester Newspapers, Inc.*, 170 Misc. 268, 8 N.Y.S. 2d 829 (1938); Prosser, Law of Torts, §111, at 739-40 (4th ed. 1971).

The majority concedes that plaintiff established at best only a marginal case of defamation but refuses to consider the issue because "appellants did not move for judgment notwithstanding the verdict, nor do they now press insufficiency of the evidence as ground for a new trial." While it is true that appellants did not seek judgment n.o.v., the record does not bear out the majority's assertion that appellants do not raise the issue of the sufficiency of the evidence. At the close of plaintiff's case, appellants moved for a compulsory nonsuit on the specific ground that plaintiff had failed to prove that the broadcast was defamatory. This same claim was reiterated in appellant's motion for new trial, and in their brief in this appeal. In these circumstances I fail to understand why the majority now declines to consider this assignment of error.

I dissent and would award a new trial, the relief requested by appellants.

ORDER OF SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR REARGUMENT

Petition denied this 4th day of February, 1972.
Per Curiam

APPENDIX B

OPINION OF THE COMMON PLEAS COURT OF DELAWARE COUNTY, PENNSYLVANIA

OPINION

We have before us the motion for new trial of the Defendants after a jury verdict of $13,500.00 against them for defamation.

Defendant Gerhart was a radio announcer for the other Defendant and station owner, Triangle Publications, Inc. The Plaintiff (Matus) was a police officer of Radnor Township, Delaware County, who engaged in a part-time auto repair, snow plowing and towing business, known as Matus' Garage, in Bryn Mawr, in the same Township.

Heavy snowfall, prior to February 1, 1966, had snarled highways and blocked driveways. Defendant Gerhart, fearing another storm, which would make him snowbound, left his home that afternoon and engaged a room in a motel near radio broadcasting station WFIL, his place of employment, so that he would be able to appear on the air to conduct his early (6 A.M.) "talk" show. He had shoveled his way enough to get his car out, and his wife was to obtain someone with snow-plowing equipment to clear the driveway.

About 7:30 A.M., the next morning, February 2, 1966, during an intermission, his wife telephoned him and informed him that the price of Matus for plowing their driveway had been $35.00. Gerhart immediately returned to the air, accused Matus of taking advantage of the situation by overcharging his wife and commented that people like Matus should be out of business. Listeners telephoned to Gerhart to add their comments.

Gerhart's "show" was a "talk" program, ranging from music to discussions of local matters of interest, with audience participation via telephone.

Plaintiff, Matus, alleged that he did not plow Gerhart's driveway at all; and that the statements of fact and comments made by Gerhart in the broadcast were false and defamatory to his personal and business reputation.

Defendants' motion for new trial raises five issues:

1. Defendants' motion for a non-suit should have been granted,

2. The Court erroneously charged that ordinary negligence would destroy Defendants' qualified privilege,

3. The Court misconstrued the effect of Defendants' retraction,

4. The Court erred in its instructions on the burden of proof, and

5. The verdict was against the weight of the evidence.

I. *Was there sufficient evidence to submit to the jury?*

The Court cannot understand how, under a motion for a new trial, Defendants have the right to raise the point that the Court erred in refusing their motion for nonsuit. If the Court did so err, Defendants would be entitled to judgment in their favor despite the verdict, not a new trial. Yet, Defendants have filed only a motion for new trial. They did not file a motion for Judgment N.O.V., which is a prerequisite for judgment on the entire record notwithstanding the verdict. A motion for new trial and one for Judgment N.O.V. are mutually exclusive, *Standard Penna. Practice,*

Vol. 6A, Sec. 3, because each seeks a different form of relief because of a different claimed error.

The issue of nonsuit is not before the Court.

II. *Was the language used defamatory?*

Anyone who searches for precedents in the sea of defamation soon finds the going rough. Both scholars and courts have indulged in semantics, rationalization, and extensive dicta. Ancient forms crop up, illogical distinctions persist, and contradictions abound.

The realm of the law of defamation has been called a murky sea. Small wonder. When the seaward paths of two inalienable rights cross, which shall give way—freedom of speech or a man's good name?

Perhaps a good deal of the murkiness would be dissipated if courts would decide the crucial issue: was the language defamatory? rather than attempt ad hoc to enunciate pertinent law, or find the same in obiter.[1] If the utterance is not defamatory, that is the end of the case. If the language is defamatory, the law of our Commonwealth clearly and definitely regulates the procedure, enunciates the respective burdens of proof, and adheres to constitutional safeguards, including current pronouncements of the Supreme Court of the United States.

What does the record show, in Plaintiff's case in chief, that Gerhart said on the air about Matus? (Defendants' brief omits crucial testimony by Matus, and omits completely the direct testimony of Plaintiff's witness, Raymond Joseph Burgess. Plaintiff was unable to obtain the presence of Burgess on the first day of trial. Defendants referred to

1. What does a defamation case really hold? To see how lawyers and scholars differ, read for entertainment, and some enlightenment, and Spurious Rule of Libel Per Quod, L. H. Eldredge, 79 Harvard Law Review, 733, February, 1966, and More Libel Per Quod, by Dean Prosser, Ibid., page 1629, June 1966.

his nonappearance and presented testimony to impeach his credibility, on the ground that Plaintiff had spoken with Burgess, a fellow policeman, concerning the broadcast which Burgess had heard. Plaintiff asked leave to call Burgess *on direct*, the next day. Defendants did not object. The trial judge directed that the defense go on in order not to delay the trial, and that Plaintiff could call Burgess the next day as a witness *on direct* and *in rebuttal*. (N/T 88-90) The trial judge may regulate the course of trial including the order of proof (*Pa. R.C.P. 224*). Note also, that Defendants had the benefit of the Court's ruling on their motion for non-suit without considering Burgess' testimony, which had not yet been given. Now, after verdict, Burgess' testimony is part of Plaintiff's case in chief in considering the present motion.)

Plaintiff produced three witnesses to prove the defamatory utterance: himself, H. M. Schultz and Burgess. Schultz and Burgess heard the broadcast, Matus did not. Matus and his attorney heard a tape replay of the broadcast some time later. Matus testified, without objection, from the replay to the statements made by Gerhart. Without comment, we note that neither party produced the tape.

H. M. Schultz, who works for the Bell Telephone Company, was driving to work and heard some of the broadcast on his car radio. He had been a customer of the Plaintiff. Part of his testimony follows:

> "Q. Do you recall the conversation or the words said by Mr. Gerhart?
>
> A. Well, the conditions that day and everyone seemed to know it was pretty miserable, and I wasn't paying attention to the radio except when Matus' Garage was mentioned. My ears perked up because I had known Raymond for such a long time.

And I heard a short conversation about the snow plow business and didn't think that was too right. . . .

Q. What was your reaction to hearing that?

A. Well, I shook my head. I said maybe instead of this guy giving me a break all the time, he is putting it to me. (N/T p. 77)

Q. Did your later discuss this with Mr. Matus?

A. It took me about three or four days to catch up with him to find out what the score was. (N/T p. 78)

On Cross:

A. I couldn't tell you what was exactly said.

Q. (The witness admitted he still patronized the garage.) Did you continue to have your friends go there?

A. I was a little dubious to ask anybody." (N/T p. 80)

While Schultz did not testify to the alleged defamatory language, he did indicate (1) that he had heard some of the broadcast (2) the comments on the broadcast were derogatory to Plaintiff's business ethics and methods.

It is the Plaintiff's burden in a slander action to prove the defamatory character of the communication, its publication by the Defendant, its application to the Plaintiff and the recipient's understanding of its defamatory meaning as applied to the Plaintiff. *Penna. Defamation Statute, 12 P.S. 1584(a), Montgomery vs. Dennison, 363 Pa. 255 (1949).* While Schultz did not prove the actual communication, he did indicate its defamatory character. Clearly, he supplied evidence as to all other requirements.

Although certain words may impute censorious conduct, still the actual language used must appear. While Schultz's testimony lacks this vital element, it is far from

merely testifying that he heard a short conversation about a snow plow business, as Defendants' brief maintains (Page 2).

Matus inter alia, testified:

Matus, who had not heard the broadcast, was spoken to by his chief about the statements made in the broadcast As a result, Matus, who was upset (N/T p. 19), telephoned Mrs. Gerhart. That evening, the Defendant Gerhart telephoned Matus.

> "Q. What did he (Gerhart) say?
>
> A. He told me that it was one of those things, that somebody might be going around using my name, and there is this thing that his wife was home alone, and he couldn't get home on account of the bad storm. And he didn't think it was right for people to take advantage of other people, like when people are home alone like his wife.
>
> And I told Mr. Gerhart it was not me. The vehicle does not even fit my vehicle, and we were plowing the night before. I was home. We had done all our plowing, and I went home.
>
> So, he told me he would be willing to call anybody, including my Chief, to retract the statement.
>
> He said, 'What could I do for you?'
>
> I said, 'Really nothing. The damage is done.'
>
> And he said, 'Well, how about if I say on the air tomorrow that it was just one of those unfortunate things?'
>
> I said, 'Mr. Gerhart, you can do what you want now.'" (N/T p. 20, 21)

Matus' testimony shows that Gerhart admitted that he did say something on the air derogatory to Plaintiff, that

it concerned plowing Gerhart's driveway, that Gerhart was in error, and offered to retract his statements.

(Note the extent of the proffered retraction.)

Some months later, Matus heard the tape replay of the broadcast at WFIL.

"Q. What were those words? (Used by Gerhart about Matus.)

A. He said that this Matus' Garage had plowed his driveway and charged him $35.00 and his wife was home alone, and people like this, taking advantage of a woman in the home alone, and he said they shouldn't be in business.

Q. Do you recall how long that announcement was? What period of time was that announcement, ten minutes, fifteen minutes?

A. He talked about it a couple minutes and then later on in the show he got a phone call, I believe, from a lady in New Jersey, and she said that was outrageous, and she was talking to him about it and didn't mention my name again.

And later on in the show he made a remark about it again but didn't mention my name." (N/T p. 23)

Plaintiff's testimony, if believed, proved 1.) that he and his business were identified in the broadcast. 2.) He supposedly charged a lone woman $35.00 for plowing the drive. 3.) He took advantage of the situation. 4.) People like him should not be in business.

Is not this language defamatory, and does it not directly and by imputation accuse the Plaintiff of unethical business conduct, overreaching, overcharging and taking advantage of a lone housewife?

Raymond Joseph Burgess, a fellow officer of Plaintiff at the time, testified that he was at home listening to the

radio (WFIL) and heard Mr. Matus referred to in connection with a plowing job that he had supposedly done on the radio announcer's driveway. (N/T p. 204, 205)

> "Q. Can you recall, as best you can, the words that he said?
>
> Q. I honestly can't recall word for word what he said. I remember him saying something about the fee that was charged was out of line. It was much too high and that people like this shouldn't be in business, and he mentioned the name Matus." (N/T p. 205)

Thus, again, another witness for the Plaintiff testified that the radio announcer accused Matus of charging a fee that was out of line, much too high, and that people like him should not be in business.

Therefore, on the issue of the language used, its defamatory character and its applicability to the Plaintiff, there was clear and sufficient evidence requiring its submission to a jury.

II. *Was the language used slanderous per se?*

In a slander suit where special damages are not pleaded, the Plaintiff must prove that the language used was slanderous per se. As the *Restatement, Torts, Section 568*, so aptly states: "It is impossible to define, and difficult to describe with precision, the two forms of defamation, slander and libel. Oral defamation is tortious if the words spoken fall within a limited class of cases in which the words are actionable per se, or if they cause temporal loss. Written defamation is actionable per se, and is a crime as well as a tort." Historically, the distinction arose on the basis of mere form, and illogically persists today.

Some courts hold that radio and T.V. presentations are more than mere oral presentations, and defamation over the

airways is a form of libel. See discussion in the *Restatement, Section 568 (3), (f);* and *Rosenbloom vs. Metromedia, Inc. 289 F. Supp. 737 (E.D. Pa.) (1968.)*

The Plaintiff did not plead special injury. Therefore, he cannot recover unless the language used was slanderous per se If the utterance was defamatory per se, then Matus was entitled to recover although he neither averred nor sustained special harm. This is the settled law of Pennsylvania, *Beck vs. Stitzel, 21 Pa. 52 (1853)*, for over 100 years.

Defendants submit that the language actually used was not slanderous per se. But they omit consideration of all of the actual language used, and they cite decisions where, obviously, the utterances were not defamatory.

One who publishes a slander which ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade or profession is liable to the other, *Restatement, Torts, Section 573.*

A man's good name is as much his possession as his physical property, *Purcell vs. Westinghouse Broadcasting Co., 411 Pa. 167 (1963)*. His good business name is an economic asset which slander can dissipate and destroy. A good business reputation is a property right entitled to protection, *Callan vs. Gaylord, 3 Watts 321 (1834)*: *Mengel vs. Reading-Eagle Co., 241 Pa. 367 (1914)*; *Sarbees vs. Warner-West Corp. 349 Pa. 365 (1944)*.

The language used, to be actionable in itself, must directly or by imputation disparage the Plaintiff in the pursuit of his calling, or tend to harm him therein. It must touch him in his profession or business and must impeach his skill, knowledge or professional conduct (citations ante).

Statements of fact may be a type of defamatory communication. Such statements usually concern the conduct or character of another, and are defamatory if they consist of an accusation of a particular act or omission which ex-

poses the Plaintiff to hatred, ridicule, or contempt, or which is otherwise prejudicial to his personal, business or professional reputation or which tends to deter third persons from associating or dealing with him. (See *Restatement, Torts, Section 565, Comment a*, and the Court's charge herein, N/T p. 211.)

Do not the words actually used by Defendant Gerhart accuse Matus directly and by clear imputation of overcharging and taking advantage of a lone woman? Do they not further say that he, and people like him, i.e., other overreachers in the snow-plowing business, should be out of business? Do they not condemn such conduct as they ascribe to Plaintiff? Do they not call upon the public not to deal with such unscrupulous persons as the Plaintiff?

Defendants cite case after case where no slander appeared. A lawyer who allegedly charges more than the going rate is not slandered, *Fowler vs. Stradley, 395 P. 2867;* nor is a real estate appraiser whose services were not worth the price in the estimation of his user, *Rossiter vs. N.Y. Press Co. 141 A.D. (N.Y.) 339;* nor was a physician who declined to lower his bill, *DePasequale vs. Westchester Newspapers, Inc. 170 Misc. (N.Y.) 268;* nor was the company whose product was so ineffective that Defendant chose to discontinue dealings, *Testing Systems, Inc. vs. Magnaflux Corp., 251 Fed. Supp. 286;* nor was the developer whose proposed apartment project looked like a chicken coop to Defendant's artistic eye, *Scott-Taylor, Inc. vs. Stoakes, 425 Pa. 426;* nor was the train conductor who was discharged for allegedly "failing to ring up fares collected", as it was his duty to do, *Pittsburgh R.R. Co. vs. McCurdy, 114 Pa. 554.*

In the case at bar, Plaintiff's business reputation and his business ethics and honesty were directly impugned and this, by way of false and inaccurate facts.

On a motion for new trial the Court must review the entire record and must consider all competent evidence to determine whether the verdict was arbitrary or capricious or whether there was clear error of law or palpable abuse of discretion in rulings, *Hayes Creek Country Club, Inc. vs. Central Penn Quarry, 407 Pa. 464 (1962)*.

Gerhart's own testimony confirmed that of Plaintiff's as to the language used and its defamatory character. See N/T pages 148, 149, 152, 159, 160, 162, 165.

The trial judge must, in the first instance, decide whether the language used was capable of being defamatory. If he decides not, that is the end of the trial. If he decides that it is, he must submit it to the jury for their determination. The words used about Matus were clearly capable of defamatory meaning, and the trial judge properly so concluded.

IV. *Does proof of ordinary negligence by a preponderance of the evidence destroy a qualified privilege?*

The court refused Defendants' point for charge (No. 13) that it was the Plaintiff's burden to prove *actual malice by clear and convincing evidence*. "Actual malice" being defined as knowledge of the falsity of the publication or with reckless disregard of its truth or falsity. "Clear and convincing" meaning beyond a preponderance of the evidence.

Defendants cited no authority at the time, and now cite the *Altoona Clay Products, Inc. vs. Dun & Bradstreet, 286 Fed. Supp. 899 (1968)* case as the supposed "malice" rule in Pennsylvania, although no Pennsylvania case so holds.

Proof of legal malice, in Pennsylvania, is necessary only where punitive damages are demanded. Punitive damages are never awarded for mere negligent conduct. As a penalty for the malice which induced a libellous publication, punitive damages may be awarded. The trial judge here

refused Plaintiff's request to charge on punitive damages and this issue was never presented to the jury. *Restatement, Torts, Section 908, Comment b; Cerri vs. Mori, 122 Pa. Super. 355 (1936); Adelman vs. Rosenbaum, 133 Pa. Super. 386 (1938); Hughes vs. Babcock, 349 Pa. 475 (1944).*

Not all defamation is actionable; an absolute privilege defeats the action, and a conditional privilege may do so if it is not abused. Like all rights, the right to one's good name is not absolute. One's good name may be destroyed with impunity in judicial or legislative inquiries. The exigencies of life require that certain persons enjoy immunity.

These same necessities, as in the communications field, have given rise to a conditional privilege.

Bluntly stated, the holder of a conditional privilege has a limited right to defame another.

Does a limited privilege in defamation law in addition to the extra protection given defendant also raise the burden of proof on the Plaintiff? A limited right to defame has already been granted to the Defendant. If, in addition, he is given the extra protection of a greater burden of proof upon the Plaintiff, the equities which gave rise to the privilege are stretched beyond any fair balance of opposing rights.

The Defendant already enjoys an extra right—the privilege to defame another after having exercised reasonable care. The nonholder of the privilege is liable for defamation whether or not he has exercised reasonable care, (Restatement, Section 579, Comment c, d; Section 580) and *regardless of his intention (Halliday vs. Cienkowski, 32 D & C 410, aff'd. 333 Pa. 123 (1929).*

The Plaintiff, Matus, was an ordinary citizen. By no stretch of the imagination could he be called a Public Official, or a Public Figure, nor did his alleged acts propel him into the public eye. Where a public official, *New York Times*

vs. Sullivan, 376 U.S. 254 (1964); or a public figure, *Curtis Publishing Co. vs. Butts, 388 U.S. 130 (1967)*, or a person propelled by circumstances into the public eye, *Time, Inc. vs. Hill, 385 U.S. 374*, is concerned, the relationship between the news disseminator or commentator and his subject has changed. It differs considerably from that between the ordinary citizen and the communications media. The relationship decrees that the object of attention and comment, who is already in the limelight, is owed a *lesser* degree of care, and his burden is thus increased.

Judge Joseph S. Lord, III, E.D. Penna, in *Rosenbloom vs. Metromedia, Inc. 289 F. Supp. 737, 741 (1938)*, in discussing the Sullivan and Butts cases remarked, "In restricting the ambit of recovery in libel actions brought by public officials and 'public figures' the Supreme Court has recognized that in light of the values served by freedom of speech and the press, certain persons are entitled to more protection than others from injuries to reputation." Judge Lord then discussed the supposed abiilty of public figures to protect themselves by public rebuttal; but "Rosenbloom was in no sense a public man," and had no means of public rebuttal and was defenseless "save to the extent that the libel law of Pennsylvania afforded him protection."

We agree. Matus was in no sense a public figure, and as an ordinary citizen is owed at least the duty of reasonable care before his name is besmirched.

The issue now resolves itself to this:

Is it an abuse of privilege for a radio announcer to unreasonably fail to ascertain the truth before he broadcasts alleged facts and derogatory comments concerning the business conduct of an ordinary citizen?

The person claiming the privilege has the burden of proving the privilege. (The Pennsylvania Defamatory Statute so provides.) A radio broadcasting station, dealing

in current events, news and discussion, has a conditional privilege and the Court so charged the jury.

The trial judge further charged the jury that, where Defendant (broadcasting station) had met its burden of showing a conditional privilege, the Plaintiff had the burden to prove to the jury an abuse of that privilege (N/T p. 215 et seq.).

Defendants assert that the Plaintiff has the extraordinary burden of proving not ordinary negligence but actual malice, and this by clear and convincing evidence in order to show an abuse of a limited privilege. They cite no Pennsylvania case and advance only the Altoona Clay Products case (W.D. of Pa.), ante, and some inapplicable language in some Federal decisions.

The rule advanced by the Defendants is not the law of Pennsylvania. Nor is it logical, equitable or supported by authority.

The Restatement, time and again, states that ordinary negligence destroys the privilege: *Section 581, f:* Radio broadcasters are liable if they fail to exercise reasonable care; *Section 594, Comment a:* Privilege is lost by lack of reasonable grounds for belief; *Section 600:* Unreasonable exercise of the privilege is an abuse; *Section 601:* Protection lost when there are no reasonable grounds for belief. The negligence of the publisher in making unqualified statements of fact without knowledge of circumstances which would lead a reasonable man to believe them to be true, is an abuse of the occasion."

In *Rosembloom*, supra, where the jury awarded an ordinary citizen $750,000.00, reduced on remittitur to $250,000.00, Judge Lord reviewed the Pennsylvania cases and found them to hold that "want of reasonable care and diligence to ascertain the truth, before giving currency to an

untrue communication, will destroy the privilege," citing *O'Donnell vs. Philadelphia Record Co., 356 Pa. 307, 315 (1947)*.

Judge Lord cites the Altoona Clay Products case before the Court of Appeal, 3rd Circuit, as in accord, for he adds: "See also, Altoona Clay Products, Inc. vs. Dun & Bradstreet, Inc., 367 F. 2d. 625 C.C.A. 3, 1966." Judge Lord then cites three other decisions of our highest Court and finally quotes extensively from Purcell vs. Westinghouse Broadcasting Co., supra.

In the *Purcell* case (*411 Pa. 167, 1963*), the Supreme Court dealt with a factual and legal situation similar to the instant case. The broadcasting company, concerned with the fleecing of the public by exorbitant charges for towing disabled cars, aired the "car towing racket" and charged the Plaintiff as a participant. Defendant claimed a qualified privilege, and maintained that malice had to be proved to destroy the privilege. The Court distinguished the legal definition of malice from its common meaning. Legal malice was held not to be synonymous with ill-temper or vindictiveness and could arise from want of reasonable care and diligence to ascertain the truth. The failure to employ reasonable care could, and did, destroy the qualified privilege.

See also, *Cosgrove Studio and Camera Shop, Inc. vs. Pane, 408 Pa. 314 (1962); McAndrew vs. Scranton Rep. Publ. Co., 165 Pa. Super. 276 (1949), rev.* on other grounds, *364 Pa. 504; Montgomery vs. Dennison, 363 Pa. 255 (1949); Bausewine vs. Norristown Herald, 351 Pa. 634 (1945); Muldering vs. Wilkes-Barre Times, 215 Pa. 470, 474 (1906); McGraw vs. Hamilton, 184 Pa. 108 (1899)*.

Under Pennsylvania law, Plaintiff's burden is to show by a preponderance of the evidence want of due care which will destroy a qualified privilege.

V. *What is the effect of a retraction?*

Before we try to answer this question, we should ask what was the retraction? The Defendant Gerhart offered the Plaintiff via airwaves a retraction of sorts, N/T p. 20, according to the Plaintiff, and undenied by the Defendant. This offer was: "Well, how about if I say on the air tomorrow that it was just one of those unfortunate things?"

What did Gerhart say the next day? N/T p. 152. "I got on the air the next morning about the same time, and I did make a statement to the effect, as Mr. Matus said, I mentioned eating crow, and I believe I did. This is quite true. (Matus said nothing about eating crow.)

And I said that I had talked with Mr. Matus, and he said that he did not do it, that he was an honest, ethical businessman, that he had no part of this."

The burden of proof of a retraction, and what it consisted of, is on the retractor.

Defendants aver the Court "misconstrued" the effect of the retraction, because the trial judge charged:

> "You may, and you should, consider in mitigation of damages that there was a prompt retraction the following day and that the subsequent behavior of Mr. Gerhart exhibited no malice and an evident desire to make amends." N/T p. 223)

The charge was generous to Defendants.

But they claim, again on the basis of the Altoona case, that such evidence, of retraction, rebuts any contention of actual malice.

Such a contention is logic gone awry. A retraction is post facto, and cannot erase the wrong done, nor define the defamer's mind at the time of the utterance. At most, it is a plea in extenuation and must be considered only in mitigation of damages. A public retraction or apology, together

with the timeliness and adequacy thereof, are to be considered in determining the amount of damages. *Wharen vs. Dorshuk, 264 Pa. 562 (1919); Boyer vs. Pitt. Publ. Co., 324 Pa. 154 (1936).*

Defendants do not claim the damages awarded are excessive, despite their contention as to mitigation. General, or compensatory, damages for slander per se are allowable without proof of special loss or of actual damage to reputation. They are imposed for the purpose of compensating the Plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have caused to his reputation. It is not necessary for the Plaintiff to prove any specific harm to his reputation or any other loss caused thereby. See Montgomery vs. Dennison, supra.

VI. *Was the verdict against the weight of the evidence?*

There is abundant evidence that Defendants used defamatory language about the Plaintiff. Defendants do not deny that such language was used. Defendants made a retraction of sorts. Defendants admit that Gerhart made no attempt to determine whether in fact it was Matus' Garage that did the plowing, (Defendants' Brief, p. 13).

The Plaintiff need not prove that recipients of the slander so understood it. That is a jury question. *Richwine vs. Pitts. Courier; Bausewine vs. Norristown Herald, supra.* Further, Plaintiff produced several witnesses who so testified.

Defendants try to indicate Gerhart's show was one of criticism and comment. It was not, according to Defendants' own evidence. It was a "talk" show, with audience participation. There was no expertise or critical evaluation of literature, art, public figures, events or the like. Its purpose and format were for entertainment, general information and non-critical comment.

Defendants advance under Weight of the Evidence an alleged error in the charge which usurped the function of the jury. The Court made it abundantly clear that it was for the jury alone to determine whether the language used was slanderous. (N/T p. 215, 218 (three times), 222, 224.) Further, Defendants sat back and did not complain or request further instructions, though asked, and cannot raise the issue after trial. See *Reba vs. Pickett, 434 Pa. 148 (1969).*

As to the direction to give words their ordinary and natural meaning, this is exactly what Defendants requested in their point for charge No. 4.

It has been said that the claim of Weight of the Evidence as a ground for new trial is the weakest and most vulnerable in the loser's already weakened arsenal. The reason is that if sufficient evidence has been presented for a jury's consideration, someone else's judgment cannot be substituted after verdict. The determination to award a new trial on this ground rests primarily in the discretion of the trial judge, (Reba vs. Pickett, supra), who, in this case, believes the evidence clearly preponderated in favor of the Plaintiff.

ORDER OF THE COMMON PLEAS COURT OF DELAWARE COUNTY, PENNSYLVANIA

ORDER

WHEREFORE, this 23rd day of July A. D. 1969, the Court denies Defendants' motion for new trial and the same is dismissed.

BY THE COURT,
s/ JOSEPH W. DE FURIA
Judge